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THE NORTH ATLANTIC COAST FISHERIES ARBITRATION.

The award of the Hague Court of Arbitration in the recent North Atlantic Coast Fisheries Arbitration between the United States and Great Britain marks the final stage in a controversy which has occupied our Department of State for almost a century. In its historical bearings, the question of the fisheries goes back to the Treaty of Utrecht in 1713, and as between Great Britain and the United States the attempt to reconcile and adjust the rights of the British and American fishermen has from 1782 on been one of the most difficult subjects of negotiation.[1] The questions submitted to the Hague Court in this arbitration find their origin in the differences growing out of the true interpretation of the provisions of Article 1 of the Treaty of 1818. This article was intended to settle the disputes then existing as to the right of the inhabitants of the United States to conduct their fishing operations along the northeastern coast of Canada.

To understand the Treaty of 1818 some consideration is necessary of the Treaty of Peace of 1783. The American negotiators of the Treaty of 1783 insisted on the continued enjoyment by the inhabitants of the United States of the right to fish on the coasts of the British colonies in the North Atlantic. The position taken by the negotiators was that the American colonies

"by reason of their exertions to acquire * * * and develop the North Atlantic fisheries and of the relation of the fisheries to them geographically and economically were as much entitled to those fisheries upon their separation from Great Britain as the people inhabiting the territories which remained under the British crown."[2]

[1] For the history of the fisheries dispute see the Introductory Statement to the Printed Argument of the United States; 3 Wharton, Digest of International Law, sec. 301 *et seq;* 1 Moore, Digest of International Law, 767 *et seq.*

[2] Printed Argument of the United States, 60.

After several drafts unacceptable to Great Britain, Article III of the definitive Treaty of Peace of September 3, 1783, provided among other things that

"the people of the United States shall have liberty to take fish * * * on such part of the coast of Newfoundland as British fishermen shall use * * * and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America and extended the further liberty to dry and cure fish in any of the unsettled bays, harbors and creeks * * * so long as they shall remain unsettled."

The American fishermen continued to enjoy their rights under this treaty until the War of 1812 interrupted their operations and raised the issue between the two governments as to the permanency of the American rights, in particular the rights to fish in the inshore waters and to use the shore for drying and curing. The United States declared these rights to have remained unaffected by the war, on the ground that the partition of the British Empire in America in 1783 applied as well to the fisheries as to the territory and "since the division of territory survived the war," so did the division of the fisheries.[3] Great Britain on the other hand insisted that the war had abrogated the American fishery rights.

In the Treaty of Peace of 1814, each country insisted so strongly on its position that it was found impossible to conclude a satisfactory article on the fisheries. Upon the American fishermen attempting to prosecute their industry as before the war, so many difficulties arose that a treaty was finally concluded in 1818, Article I of which sought to settle the existing differences. This article reads as follows:

"Whereas differences have arisen respecting the Liberty claimed by the United States for the Inhabitants thereof, to take, dry and cure Fish on Certain Coasts, Bays, Harbours and Creeks of His Britannic Majesty's Dominions in America, it is agreed between the High Contracting Parties, that the Inhabitants of the said United States shall have forever, in common with the Subjects of His Britannic Majesty, the Liberty to take Fish of every kind on that part of the Southern Coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the Western and Northern Coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the Coasts, Bays, Harbours, and Creeks from Mount Joly on the Southern Coast of Labrador, to and through the Straits of Belleisle and thence Northwardly indefinitely along the Coast, without prejudice however, to any of the exclusive Rights of the Hudson

[3]Printed Argument of the United States, 9.

Bay Company; and that the American Fishermen shall also have the liberty forever, to dry and cure Fish in any of the unsettled Bays, Harbours, and Creeks of the Southern part of the Coast of Labrador; but so soon as the same, or any Portion thereof, shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Portion so settled, without previous agreement for such purpose with the Inhabitants, Proprietors, or Possessors of the ground. And the United States hereby renounce forever, any Liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure Fish on, or within three marine Miles of any of the Coasts, Bays, Creeks, or Harbours of His Britannic Majesty's Dominions in America not included within the above mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours for the purpose of Shelter and of repairing Damages therein, of purchasing Wood, and of obtaining Water, and for no other purpose whatever. But they shall be under such Restrictions as may be necessary to prevent their taking, drying or curing Fish therein, or in any other manner whatever abusing the Privileges hereby reserved to them."

For some few years the difficulties seemed to have been satisfactorily adjusted, but from 1836 on, when Nova Scotia evolved an interpretation of the Treaty unfavorable to American interests, disputes have been more or less constant. It is these differences that were sought to be adjusted by the present submission to the Permanent Court of Arbitration at the Hague.

For the purpose of determining the respective rights, Article I of the Treaty of 1818 was recognized as the measure of the rights and obligations of the United States and Great Britain. Seven questions in all were framed, which will be taken up in the order of their submission to the Tribunal. The principal legal arguments on both sides will be considered briefly and an analysis will be attempted of the decision of the Court and its effect in practice.

Question I reads as follows:

"To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said Article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating

to fishing; such regulations being reasonable, as being, for instance—

(*a*) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article I the inhabitants of the United States have therein in common with British subjects;

(*b*) Desirable on grounds of public order and morals;

(*c*) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty of liberty, and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and inplements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character—

(*a*) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(*b*) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(*c*) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement."[4]

Under this Question the principal contention of the United States was, that by reason of the partition of the fisheries they had secured the right to have a voice in their regulation. The principal legal argument used to support this contention was that the Treaty of 1818 created an international servitude in favor of the United States. It was shown that the three essentials of an international servitude were present in this Treaty: first,

[4]Award, pp. 9-10; 4 American Journal of International Law 954-5 (Oct. 1910); Printed Argument of the U. S., 13. (Hereafter in this article the October, 1910, number of the American Journal of International Law, in which the award is printed, will be referred to as "Journal").

that it be created by one State for the benefit of another State; second, that it be beyond the control of the State creating it; third, that it make the territory or part of the territory of one State serve the interests of another State.[5] The argument being thus aimed at proving that the treaty created the relation of servitude between the two States, the authority of the leading writers on international law was then invoked in order to deduce the legal consequences flowing from the servitude, especially that it is a restriction of the sovereignty of the servient State, and that the dominant State exercises its right free from control or regulation or restriction by the servient State.[6] The United

[5]Printed Argument of the United States, 30.

[6]See the following references to International Law, in all of which the doctrine of servitudes is recognized and treated with varying degrees of fullness and detail: Bluntschli, *Das Moderne Völkerrecht der civilisirten Staten* (1868, French trans. by Lardy, 5th ed., 1895) secs. 353-359, pp. 212-215; Bonfils, *Manuel de Droit International Public* (5th. ed. by Fauchille, 1908) sec. 339-344, pp. 189-192; 2 Calvo, *Dictionnaire de Droit International* (1885) 214-215; 3 Calvo, *Droit International* (5th. ed., 1890) sec. 1583, pp. 356-357; Chrétien, *Principes de Droit International Public* (1893) secs. 259-263, pp. 268-273; Clauss, *Die Lehre von den Staatsdienstbarkeiten* (1894); Creasy, First Platform of International Law (1876) secs. 256-261; Despagnet, *Cours de Droit International Public* (3d ed. 1905) secs. 190-192, pp. 204-207; Diena, *Principi di Diritto Internazionale* (1908) 125-129; Fiore, *Diritto Internazionale Codificato* (4th. ed. 1909) secs. 1095-1097, pp. 428-429; *id.*, French trans. by Chrétien (1890) secs. 615-619; 1 Fiore, *Nouveau Droit International Public* (French trans. by Antoine, 1885) secs. 380-381, pp. 336-338; 2 *id.* secs. 829-830, pp. 116-118; Fabre, *Des Servitudes dans le Droit International* (1901); Gareis, *Institutionen des Völkerrechts* (2d ed. 1901) sec. 71, pp. 205-206; Hall, International Law (5th. ed. 1904) 159-160; Halleck, International Law (1861) ch. IV, sec. 20, pp. 92-93; Hartmann, *Institutionen des praktischen Völkerrecht* (1874) sec. 62, pp. 179-181; Heffter, *Europäisches Völkerrecht der Gegenwart* (1844), French ed. by Geffcken (1883) secs. 43, 64, 67, pp. 104-108, 154, 158; Heilborn, *System des Völkerrechts* (1896) 30-34; Hollatz, *Begriff und Wesen der Staatsservituten* (1908); 2 Holtzendorff, *Handbuch des Völkerrechts* (1887) sec. 52, pp. 246-252; Klüber, *Droit des Gens Moderne de l'Europe* (1819, Ott's 2d. ed., 1874) secs. 137-139, pp. 194-198; Lomonaco, *Trattato di Diritto Internazionale Pubblico* (1905) 248; 1 G. F. de Martens, *Précis du Droit des Gens Moderne de l'Europe*, ed. by Vergé (1864), sec. 115, pp. 313-315; 1 F. de Martens, *Traité de Droit International* (French trans. by Léo, 1883) secs. 93-95, pp. 479-491; 2 Mérignhac, *Traité de Droit International Public* (1907) 366-370; Neumann, *Grundriss des heutigen Europäischen Völkerrechts* (3d. ed. 1885) sec. 13, pp. 31-33; Olivart, *Tratado de Derecho Internacional Publico* (4th. ed. 1903) sec. 53, pp. 368-372; H. B. Oppenheim, *System des Völkerrechts* (2nd. ed. 1866) secs. 9-10, pp. 140-145; 1 L. Oppenheim, International Law (1905) secs. 203-208, pp. 257-263; 1 Phillimore, International Law (3d. ed. 1879) secs. 277-283, pp. 388-392; Piédelièvre, *Précis de Droit International Public* (1894) sec. 288, p. 259; 2 Pradier-Fodéré, *Traité de Droit International Public* (1885) secs. 834-845, pp. 395-406; Rivier, *Lehrbuch des Völkerrechts* (2d. ed. 1899) 192-194; 1 Rivier, *Principes du Droit des Gens* (1896) sec. 23, pp. 295-303; Taylor, International Public Law (1901) secs. 217, 252, 346, pp. 263, 299-301, 369; 1 Twiss, Law of Nations (2d. ed. 1884) sec. 245, pp. 423-424; Ullmann, *Völkerrecht* (2d. ed. 1908)

States thus endeavored to demonstrate the conclusion that the right of its inhabitants under the Treaty was a sovereign right; that as it was free from regulation in 1818 so it continued to exist free from British control ever after; that if regulations for the preservation of the fish were necessary the United States must concur in their enactment and in their enforcement.

Great Britain's principal contention was that the liberty to fish granted in the Treaty of 1818 was merely a privilege granted to foreigners to exercise certain liberties in British territory and as such involved no exemption from the local law. The nature and measure of the right of the United States, they contended, are to be derived from the terms of the Treaty. To ascribe a name to the right, such as "international servitude," was superfluous.

The term "liberty" used in the Treaty furnished a basis for argument by both nations. Great Britain contended that the term was equivalent to *permission,* the United States that it was synonymous with *franchise* and in that sense a *right.* John Adams' testimony was adduced to the effect that the word was used in the Treaty of 1783 as equivalent to *right,*[7] and the Treaty of 1818 it was contended followed that of 1783 in the use of the word "liberty."

In further support of this contention it was shown that the French fishery had always been recognized as a *right,* though the clause creating it provided that French subjects "shall be *allowed*" to fish, and in the Treaty of 1763 "shall have the *liberty* of fishing."[8]

Emphasis was laid by both parties upon the use of the words "in common." Great Britain contended for her unlimited right to make regulations upon the ground that as British fishermen were certainly subject to the sovereign power of Great Britain, these words show that the American fishermen were to enjoy the same liberty as the British, but no more. If the American fishermen were

secs. 99-100, pp. 319-324; Vattel, *Droit des Gens,* 1758 (Chitty's Eng. trans. ed. by Ingraham, 1852), Bk. II, ch. 7, sec. 89, p. 168; 1 Westlake, International Law (1904) 60-62; Wharton, Comm. on American Law (1884) secs. 149-150, pp. 228-229; Wharton, International Law (Dana's ed., 1866) sec. 268; Wilson & Tucker, International Law (5th. ed. 1909) 123, 152-153.

These authorities are cited in the Printed Argument of the United States, p. 19.

[7]Case of the United States, 31; Appendix to the Case of the United States, 318.

[8]Printed Argument of the United States, 34.

free from local legislation the right would not be one "in common."[9] The United States contended that the phrase "in common" was not used in order to limit the American rights to such liberties as Great Britain then allowed to British subjects, "but to evidence that the liberty was one held equally by the fishermen of the two nations and to be enjoyed by neither to the exclusion of the other."[10]

The Tribunal divided their decision on Question I into two parts: *First,* Has Great Britain the right to regulate reasonably? *Second,* If so, has she the right without the concurrence of the United States?

On the first point the Tribunal decided that Great Britain's sovereign right to legislate was unimpaired by the Treaty. In doing so, they held that the United States possessed no sovereign rights in Canadian waters and that an international servitude did not exist in their favor. The Tribunal's first objection to the admission of an international servitude was that the doctrine was not known to American or British statesmen in 1818, nor was it employed by English publicists before 1818.[11] Mr. Gallatin's statement that the relation created by the Treaty was "what the French civilians call a servitude,"[12] they considered "insufficient" evidence.[13] It is not apparent why a legal relation between States should be refused recognition even though its exact name in international law is only subsequently applied to it.

Another serious objection advanced by the Tribunal to the contention of the United States was that

"a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a *praedium dominans* and a *praedium serviens;* whereas by the Treaty of 1818 one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State."[14]

In arriving at this conclusion, the Tribunal has apparently lent little weight to the array of international law writers com-

[9]British Case, 46-7.

[10]Printed Argument of the United States, 36.

[11]Award, 12; Journal, 958.

[12]Letter of Mr. Gallatin to John Quincy Adams, Appendix to the British Case, 97.

[13]Award, 12; Journal, 958.

[14]Award, 13; Journal, 958.

mencing with Vattel,[15] who hold expressly that a right to fish may be and has been the object of an international servitude.[16] While it is true that a *State* cannot exercise the right to fish—an objection to the doctrine of international servitudes the Tribunal could not overcome—it does possess the sovereign right to protect its subjects, for whom the right was secured and in whose favor it exists, in the exercise of their liberty. That is why the right to fish when granted to one State or its inhabitants in the territory of another is a sovereign right. The individual exercising the right derives it not from the original grantor, but from his own State.

A further objection of the Tribunal to the contention of the United States was that

"the doctrine of international servitudes in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions in the Holy Roman Empire of which the *domini terrae* were not fully sovereigns. * * *"

They further held that "the modern State and particularly Great Britain has never admitted partition of sovereignty."[17]

Of all the grounds on which the Tribunal has placed its decision this is perhaps the weakest. Because the doctrine "originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire" is no good reason why the development of the doctrine into modern civil and international law, admitted by practically every civil and international law authority, should be refused recognition.

Moreover, it is difficult to reconcile the *dictum* of the court that the French right to fish on the coast of Newfoundland was one exclusive of British control with the statement that "the modern State and particularly Great Britain, has never admitted partition of sovereignty," meaning by the expression "partition of sovereignty" a derogation from a certain part of a State's sovereign rights in its own territory in favor of another State.

The object which moved the United States to advance the doctrine of international servitude was to prove, as stated above, that

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[15]Law of Nations (1758), Chitty's trans. sec. 89, p. 168; Printed Argument of the United States, 20.

[16]The Tribunal in its decision held the French right to fish in British territory created by the Treaty of 1713 and continued by that of 1763 to be an exclusive one (Award, 11; Journal, 956); presumably therefore it is an international servitude, as the authorities maintain.

[17]Award, 13; Journal 958.

by reason of the sovereignty which would flow from the recognition of the servitude in their favor they had a concurrent voice in the establishment of regulations, and that the independent right of Great Britain, the servient State, to make regulations without the consent of the United States, the dominant State, would be a restriction or limitation of the sovereign right of the dominant State. The Tribunal struck at the root of this contention by holding[18] that "such regulations as are reasonable and made for the purpose of securing and preserving the fishery and its exercise for the common benefit" are not restrictions at all and that such regulations are not inconsistent with a servitude. This decision would seem to make the findings on the direct question of the existence of an international servitude *dictum.*

The culminating point of the Tribunal's adverse decision on this contention of the United States was their finding that the fishery in 1818 was a regulated one, regulated by Great Britain, and it was to such a fishery only that the United States inhabitants were admitted. The United States had contended that the fishery having been unregulated as to the time and manner of fishing in 1818, remained so as to the inhabitants of the United States thenceforth. Subsequent British regulation therefore, it was contended, was not binding on the inhabitants of the United States.[19]

The arbitrators denied absolutely the contention of the United States as to the meaning of the words "in common," because it was held to be inconsistent with the historical basis of the American fishery liberty. As evidence they adduced John Adams' proposal of 1782 that the "people of the United States shall continue to enjoy unmolested the right to take fish * * * where the inhabitants of both countries used at any time heretofore to fish." They held furthermore that the theory of the partition of the fisheries, advanced by the American negotiators, and ever since by the United States, negatives the assumption of an exclusive right to fish on the British shores. The real import of these words they held to be to "exclude the supposition that American inhabitants were at liberty to act at will for the purpose of taking fish, without any regard for the coexisting rights of other persons entitled to do the same thing," and because the words properly express a "common subjection to regulations as well as a common right."[20]

[18]Award, 13; Journal, 959.

[19]British printed report of oral argument, 1237, 1246.

[20]Award, 16; Journal, 961.

The contention of the United States that the Treaty of 1818 must be interpreted in its relation to the Treaty of 1783, which latter treaty was an act of partition of sovereignty and not annulled by the war, the Tribunal denied. They held that the right to take fish was accorded "as a condition of peace to a foreign people" and that the Treaty of 1818 was a "new grant."[21]

One argument which was made by the United States the Tribunal rejected in unequivocal terms. The United States submitted in evidence an extended list of clauses in certain treaties concluded by the United States and Great Britain with foreign powers between the years 1780 and 1840, which contained the provision that foreigners residing or travelling in the country shall be subject to the local law.[22] The Treaty of 1818 containing no provision to this effect, the inference was drawn that the fishermen of the United States in British territory were intended to be exempt from local regulations. The Tribunal placed its disagreement with this contention of the United States on the ground that this provision of the treaties cited was merely affirmatory of recognized international law, quite outside of treaty provisions; that at the time of the treaties mentioned foreigners were not admitted to equal rights with nationals; and that the provision for subjection to local law was to preserve the discriminations. As there was no such discrimination in the common enjoyment of the fishery by American and British fishermen, no such provision was required.

Before taking up the answer of the Tribunal to the second part of Question I: "Can the right of regulation be reasonably exercised by Great Britain without the consent of the United States?", it may be said briefly that the United States contended that certain regulations, particularly as to the use of purse seines and the prohibition of fishing on Sunday were unnecessary for the preservation of the fishery, were prejudicial to the interests of United States fishermen, and were unreasonable. They further contended that if Great Britain was to be the sole judge of the reasonableness or unreasonableness of the regulations, the United States fishermen would be without protection. Mr. Root, therefore, in his oral argument asked the Tribunal to draw a line beyond which Great Britain could not go by reason of the limitations upon British action imposed by the Treaty of 1818. He emphasized the necessity of a concurrent right to co-operate in the making and

[21]Award, 17; Journal, 962.

[22]British printed report of oral argument, 1224 *et seq.*

enforcement of regulations as the only proper security to the inhabitants of the United States in the enjoyment of their liberty of fishing.

On the main question the Tribunal held that the recognition of a concurrent right in the United States to consent to British legislation would affect the independence of Great Britain, which would thus "become dependent on the United States for the exercise of its sovereign right of regulation," and that such an impairment of British sovereignty cannot be derived from the terms of the Treaty. The only limitation upon the right to legislate freely, they considered, is the obligation "to execute the Treaty in good faith" under the sanctions provided by international law.[23]

It was on evidence quite apart from the Treaty, that the United States have practically, by the decision, secured the desired voice in fishery legislation. In the wording of Question I, in the evidence furnished by the diplomatic correspondence, and in the admission of counsel in court,[24] Great Britain had recognized and admitted that her right to regulate was limited to "reasonable regulation." While deciding, therefore, against the right of the United States under the Treaty to participate in the enactment of fishery legislation, the Tribunal nevertheless held that the right of regulation inherent in Great Britain had been limited by these repeated admissions in the diplomatic correspondence, in the very words of the present submission, and in the argument of counsel, to *reasonable regulation.*[25] In accordance with Article IV of the Special Agreement under which the Tribunal had been assembled they then proceeded to recommend certain procedure by which the United States could within two months after the enactment of fishery legislation contest its reasonableness and submit the question to the arbitrament of a Permanent Fishery Commission to be established.

While the United States, therefore, have lost the decision on the theory of Question I, they have nevertheless gained their point in that they now have what amounts to a veto power in case the Fishery Commission allows their eventual protest against the reasonableness of any future legislation. Legislation objected to by the United States on the ground of unreasonableness cannot come into force unless the Commission decides against the United States.

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[23] Award, 19-20; Journal, 964-5.

[24] British printed report of oral argument, 1277.

[25] Award, 21; Journal, 966.

Question II reads as follows:

"Have the inhabitants of the United States while exercising the liberties referred to in said Article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?"

The United States vessels had been in the habit of proceeding to the Treaty coast—that is the portion of the coast where they had the Treaty right to fish—and there supplementing their crews for the fishing season, discharging the men thus engaged before the return voyage to the United States. Without the right to engage their crew in this way, American fishermen would have been seriously hampered in the exercise of their Treaty right, for it is practically impossible and entirely too expensive to engage full crews from the United States and bring them home again.

Newfoundland had, however, passed a number of statutes forbidding any person to engage himself in the crew of any foreign fishing vessel in the waters of Newfoundland or to leave the colony for that purpose, and had prohibited aliens, not enjoying treaty privileges, from fishing in British waters.[26] The policy underlying these statutes was in line with the British contention that the right to fish was granted to the inhabitants of the United States exclusively and that no one but an inhabitant of the United States could fish from American vessels. The British or Canadian Government could, therefore, without infraction of the Treaty, prohibit persons other than Americans from engaging as fishermen on American vessels.

The contention of the United States, as formulated by Mr. Root, was that any American vessel was entitled to fish in the Treaty waters; that men of any nationality or place of residence might be engaged to handle the vessel, its boats and nets, on the theory that the liberty assured to the inhabitants of the United States by the Treaty includes the right to use all the means necessary for exercising the liberty, not only ships and nets, but crews to handle them; and that no right to control or limit the means to be used can be admitted, there being no such provision in the Treaty.

The issue narrowed down amounted to this: When the American vessel with a partly foreign crew proceeds to the Treaty coast to fish, who under the Treaty is doing the fishing? Is it the *entrepreneur*, the American owner of the vessel, or is it the indi-

[26]Act of 1906, Articles 5-7; British Case Appendix, 757-8; United States Case, Appendix, 197, 199.

vidual who actually mans the boats, and hauls in the nets? The American owner, contended the United States, is the only one enjoying the Treaty right; the foreign crew, not inhabitants of the United States, contended Great Britain, are in this case exercising privileges granted to inhabitants of the United States exclusively.

The decision of the Tribunal on this Question is remarkable. In the first part of the award they apparently find absolutely for the United States. They hold that the liberty to take fish under the Treaty is an economic right, that the exercise of the right includes the right to employ the necessary servants, and that the right to employ servants has not been limited by the Treaty to the employment of persons of a distinct nationality or inhabitancy. Thus far, the United States contention is supported entirely.

The question as to who under the Treaty is doing the fishing, the *entrepreneur* or the member of the crew doing the manual labor is decided in favor of both countries in that the arbitrators hold "that the liberty to take fish as an economic liberty refers not only to the individuals doing the manual act of fishing but also to those for whose profit the fish are taken."[27]

The Tribunal then reach a number of conclusions which appear not merely to render the decision in favor of the United States nugatory, but when carefully scrutinized, seem to make the decision on Question II a victory for Great Britain.

They hold (a) that it is

"in the interest of the inhabitants of the United States that the fishing liberty granted to them be restricted to exercise by them and removed from the enjoyment of other aliens not entitled by this Treaty to participate in the fisheries."[28]

They then find (b) that certain British statutes (mentioning two of 1819 and 1824)[29] prohibit aliens from fishing in British waters, excepting those entitled by Treaty, and that this exception exempts "from these statutes American fishermen fishing by the agency of non-inhabitant aliens employed in their service."

The culmination of their decision is (c)

"that the Treaty does not affect the sovereign right of Great Britain as to aliens, non-inhabitants of the United States, nor the right of Great Britain to regulate the engagement of British subjects while these aliens or British subjects are on British territory."

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[27]Award, 28; Journal, 973.

[28]Award, 28; Journal, 974.

[29]They say nothing about the Act of Newfoundland of 1906.

The decision under *a*, therefore, is a direct approval of the statutes prohibiting aliens not inhabitants of the United States from participating in the fisheries.

Under finding *b*, they held the American fisherman fishing by the agency of such aliens, exempt from the restrictions of such prohibitory statutes. In other words, the American fisherman so engaging an alien is within his Treaty rights, but his employee, the alien, whom he has a right to engage is guilty of a breach of the law.

Under *c*, Great Britain can apparently prohibit by municipal legislation the engagement of aliens as well as of British subjects on British territory.

The result of the decision under Question II, therefore, would seem to be that while the American fishermen coming, let us say, from Gloucester have the right to engage non-inhabitants of the United States as employees, the British colonies in the exercise of an equally legal right can by municipal legislation prohibit such non-inhabitants of the United States not only from doing the manual act of fishing in British waters, but they can also prevent the engagement, as they have already done, of aliens and British subjects on British territory.[30] They thus penalize the employee for entering into a contract which under the Treaty the American employer has the legal right to make with him. It is difficult to perceive what remains of this particular right of the American fisherman.[31]

Under Question III, which raised the issue as to whether the American fishermen exercising their Treaty privileges could be subjected to the requirement of entry and report at custom-houses or payment of light and harbor dues, as Great Britain claimed they could, the Tribunal decided that there should be no such requirement for reporting unless reasonably convenient opportunity for so doing be at hand; also that the American fishermen "should not

[30]The only statute of this nature which seems to have escaped the approval of the court is that Article of the Act of Newfoundland of 1906 which prevents Newfoundlanders from leaving the Colony "for the purpose of engaging in foreign fishing vessels which are fishing or intend to fish in the waters of the Colony."

[31]Mr. Root in his argument drew the attention of the Tribunal to the fact that the only question here submitted was whether American vessel owners had the *right*, under the Treaty, to engage non-inhabitants of the United States as members of their crews. This question the Tribunal answered unequivocally in favor of the United States. It may be that the negotiators of the new treaty, which will probably be drawn shortly, will be able to utilize this portion of the decision as a means to secure the repeal of municipal legislation inconsistent or interfering with the effective exercise of this right of the United States vessel owners.

be subject to the purely commercial formalities of report, entry and clearance at custom-houses, nor to light, harbor and other dues not imposed upon Newfoundland fishermen," as this would constitute an unfair discrimination between them and Newfoundland fishermen and one inconsistent with the liberty granted to the inhabitants of the United States to take fish "in common with the subjects of His Britannic Majesty."[32]

Under Question IV, the Tribunal decided that the right of American fishermen under Article I of the Treaty of 1818 to enter bays or harbors for shelter, repairs, wood and water, cannot be burdened with restrictions making the exercise of such privileges conditional upon the payment of light, harbor and other dues, or entering or reporting at custom-houses, as such conditions would be inconsistent with the grounds upon which such privileges rest, *i. e.*, the duty of "hospitality and humanity which all civilized nations impose upon themselves and expect the performance of from others."[33]

Question V reads:

"From where must be measured 'the three marine miles of any of the coasts, bays, creeks or harbours' referred to in the said Article?"

The argument of this Question, perhaps the most important of those submitted for determination, involved a discussion of most interesting problems of international law. Arguing the question for the United States, Mr. Charles B. Warren made one of the ablest arguments in the case.

The issue in this Question necessitated a construction of the renunciatory clause of the Treaty:

"And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water and for no other purpose whatever."

It was agreed by both countries that the three miles in the case of unindented coasts must be measured "from the shore line at low tide."[34] The difficulty arose in the case of bays. What was meant

[32]Award, 30; Journal, 976.
[33]Award, 30; Journal, 976.
[34]British Case, 122.

by three miles from a bay of His Britannic Majesty's dominions in America? Did it mean three miles from the shore line of the bay? Did the negotiators mean, as contended by Great Britain, three marine miles from the outside of the bay or from a line connecting the headlands of the bay? If so, where are the headlands of any particular bay? Mr. Warren in his argument pointed out that in practically every one of the bays there were several points of land which might be called headlands and that it was impossible to assume that the negotiators of the Treaty could have intended to measure the three marine miles from a line connecting headlands without indicating which of several possible lines they meant.

The contention of the United States was that the bays of His Britannic Majesty's dominions in which the right to fish had been renounced were, as indicated by the term, territorial bays of Great Britain, *i. e.*, those which by the rules of international law were recognized as territorial. That is to say, a bay would be considered under territorial sovereignty to the point where its two shores contracted to a width of six miles or three miles from either shore. The contention was that the three mile line followed the sinuosities of the coast until it came to a bay; if the bay was six miles or less wide or contracted to that width, the lines would meet at a point; through the point where these lines following the sinuosities of both shores thus met, which would then be three miles from either shore or six miles, a line would be drawn, and the three marine mile line would be measured in the case of bays from this six mile line. In thus considering a six mile bay, so to speak, as the limit of territorial jurisdiction over bays in 1818, the United States were supported by the great weight of authority.[35] The United States found support for their argument in an instruction of the Government of Great Britain in 1870 which read:

"When a bay is less than six miles broad, its waters are within the three mile limit, and therefore clearly within the meaning of the

[35]British printed report of oral argument, 729-34; Vattel, Book I, ch. 23; Neyron 239; G. F. de Martens secs. 40 and 41; Klüber secs. 130 and 131; Heffter secs. 75 and 76; 1 Ortolan, 1853 ed., 152; Hautefeuille, 1868 ed., 57; 1 De Cussy secs. 40 and 41; Twiss, 1884 ed., 292-295; Fiore, Antoine's ed., sec. 808; Calvo secs. 353, 367; Funck-Brentano and Sorel, 1900 ed., 375; Ferguson, Vol. I, pp. 396-397; 2 Pradier-Fodéré sec. 662; Testa 69; 1 Piédelièvre sec. 417; Despagnet, 1899 ed., sec. 415; Liszt, 5th. ed., 91; 1 Westlake 187-88; 1 Nys 446; 1 Oppenheim 246, 247, 248; Holland, "Letters to the Times," 132.

The doctrine these authorities maintain is that coastal waters are territorial to the range of cannon-shot; the range of cannon-shot being generally agreed upon as equivalent to three miles in 1818, bays were considered territorial to a distance of three miles from either shore, or six miles across.

Treaty; but when it is more than that breadth the question arises whether it is a bay of Her Britannic Majesty's dominions."[36]

From this declaration and from the argument of the United States and that of Great Britain, to be stated presently, the issue on Question V would seem to have been, what was the extent of bay over which Great Britain had sovereignty and in which the United States renounced for its inhabitants the right to fish?

In the Treaty of 1783, it will be recalled, the vessels of the United States had the right to fish up to the very shores of the British possessions in the North Atlantic. After the war of 1812 and in the negotiations prior to and leading up to the Treaty of 1818, Lord Bathurst, Lord Castlereagh, Mr. Bagot and others had claimed that Great Britain would thereafter exclude vessels of the United States from fishing in waters which they described as within the "exclusive jurisdiction of Great Britain," "within the British limits," "within the limits of the British sovereignty."[37] As Lord Bathurst and others had defined these terms as signifying, "a marine league from the shore"[38] of the British possessions, the United States contended that these terms

"referred to a jurisdiction over the territorial sea extending only three marine miles from the shores of His Majesty's possessions in North America, comprehending only bays, creeks and harbors found therein."[39]

The right of fishing in the high seas was not in dispute.[40]

The contention of the United States was that a line following the sinuosities of the coast at a distance of three marine miles would not enter bays six marine miles or less in width at their entrances, *i. e.*, "bays within the exclusive jurisdiction of Great Britain," the lines closing these bays being continuations of the shore line.

The argument was then made that the meaning given to the words of the renunciatory clause contemporaneously with the sign-

[36]United States Case Appendix, 628; United States Printed Argument, 118; British printed report of oral argument, 616. Lord Fitzmaurice in the course of a debate in the House of Lords on Feb. 21st, 1907, on the Moray Firth case also admitted that the extent of British territorial sovereignty in bays was limited to a width of six miles (British printed report of oral argument, p. 1309).

[37]Mr. Bagot to Monroe, Nov. 27, 1816, United States Case Appendix, 290; Castlereagh to Adams, May 17, 1817, United States Case Appendix, 295.

[38]United States Case Appendix, 265, 268-269; United States Case, 25.

[39]United States printed Argument, 124.

[40]Bathurst expressly stated to Mr. Adams that "it was by no means Her (Great Britain's) intention to interrupt them (United States fishermen) in fishing anywhere in the open sea, or without the territorial jurisdiction a marine league from the shore." United States Case Appendix, 265.

ing of the Treaty and subsequently in the diplomatic correspondence and by the acts of the two Governments, clearly show that the British territorial bays were limited to such as were within three miles from shore as interpreted above. The decisions in the *Washington* and *Argus* cases under the Claims Convention of 1853 both sustained the contention of the United States.[41] Moreover, the words "American fishermen shall be admitted to enter such bays * * * for the purpose of shelter," etc., would surely indicate that only small bays were referred to, for who would seek shelter in a fifty or sixty mile bay?

The United States, in support of its contention that a territorial bay did not in 1818 exceed six miles in width, adduced the authority of international law writers to the effect that the three mile limit of territorial jurisdiction was the result of the adoption of the principle, formulated by Bynkershoek,[42] that the territory of a nation extends as far as the range of cannon shot from the shore, and that international law, evidenced in treaties, decisions and opinions of authorities had identified this distance with three miles, or in the case of bays, three miles from either shore or six miles.[43] The few exceptions to this rule of defensibility as the test of territoriality were based on assertions of more extended jurisdiction by the State claiming it and acquiescence therein by other States. This rule covered the case of such bays as Delaware and Chesapeake, about ten and eleven miles wide respectively at the mouth.[44]

The next step in the argument was to show that in 1818 Great Britain and the United States identified the range of cannon shot with three marine miles and had adopted the three mile rule of territoriality. In view of Stowell's and Story's decisions, the diplomatic correspondence of the time and the treaties concluded by both countries around 1818, this was not difficult to prove.[45]

[41]United States printed Argument, 167 *et seq;* U. S. Case, 131-133. These vessels were seized by Great Britain in wide bays at a distance more than three miles from shore; the seizures were held illegal, and damages awarded the claimants.

[42]"De Dominio Maris," Chap. 2 (Opera Omnia, 1767 ed., II, p. 127).

[43]British printed report of oral argument, 727. Galiani 422; 1 Ortolan, 1853 ed., 171; 1 Phillimore, 1879 ed., 274, 276; Heffter, 1883 ed., sec. 75; Azuni, 1806 Amer. ed., sec. 15; Twiss, 1884 ed., 292; Pradier-Fodéré sec. 632; Fiore, *Droit International Codifié* sec. 205; 1 Rivier 146; 1 Ferguson 399; Stoerk in 2 Holtzendorff *Handbuch* 474; Perels, *Manuel,* 1884 ed. 30; Calvo sec. 356; Hall, 5th. ed., 154; 1 Oppenheim 241.

[44]British printed report of oral argument, 724.

[45]Lord Stowell in Twee Gebroeders, Northolt Master (1801) 3 Robinson 336, 339; Twee Gebroeders, Alberts Master (1800) 3 Robinson 162-3; The Anna (1805) 5 Robinson 373; Story in The Brig Ann (1812) 1 Gallison 62; for references to diplomatic correspondence and treaties see British printed report of oral argument, 726-7.

The contention of Great Britain was that the term "bays of * * * His Britannic Majesty's dominions" was a geographical description of the bays renounced by the United States; in other words, such bodies of water as were known on maps as bays. In the British printed Argument[46] it was contended that the territoriality of these bays was immaterial. Mr. Warren, however, showed that Great Britain's contention that geographical bays were renounced led to the natural consequence that the United States renounced in favor of Great Britain a part of the high seas, for only part of the geographical bays were territorial. Great Britain was thus compelled to direct her proof to show that while the Treaty renounced geographical bays, nevertheless they were also territorial bays of Great Britain. They were thus constrained to make territoriality the issue, for their case appeared hopeless if they were to rely on proof that the negotiators of the Treaty of 1818 renounced in Great Britain's favor the right to fish in a portion of the high seas. Mr. Ewart, of British counsel, in his oral argument[47] expressly disavowed the claim that the United States renounced a portion of the high seas, but squarely took the ground that the bays in question were territorial bays.

The territorial character of the bays more than six miles wide—and this included the majority—had to be sustained upon some other ground than their defensibility, for both in international law and in actual practice in 1818 the limit of defensibility of bays was six miles. Great Britain, therefore, sought to prove their territoriality by alleging assertion of claims of wider jurisdiction and acquiescence therein by other powers.

Another line of argument consisted in destroying the application of the three mile rule to bays. Counsel for Great Britain could not deny the repeated references in the diplomatic correspondence of their statesmen, writing prior to and immediately before 1818, to "British limits," "exclusive jurisdiction of Great Britain," "within the maritime limits of Great Britain," nor Bathurst's translation of this term into "a marine league from the shore." They simply confined their argument to prove that when these terms were used they applied to the open coast only and not to bays. In spite of the mass of authorities adduced by the United States to show that the term "maritime jurisdiction" included not merely the maritime belt but also the bays within the three mile

[46]P. 92.

[47]British printed report of oral argument, 756.

limit,[48] the British argument seems to have found favor with the Tribunal. The British contention was that bays were in a class by themselves, were always so dealt with in treaties, and had been so regarded by the United States and Great Britain.

The decision of the Tribunal on this Question will surely arrest attention. Their general finding that "in the case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay" can not in itself be considered objectionable, although it means very little. Apparently it supports the British contention, that geographical bays were intended to be renounced by the Treaty.

The ground on which they sustain this conclusion, however, is nothing less than startling. Their first finding is as follows:

"The United States contend, first, that while a State may renounce the treaty right to fish in foreign territorial waters it cannot renounce the natural right to fish on the high seas.

"But the Tribunal is unable to agree with this contention, because, though a State cannot grant rights on the high seas, it certainly can abandon its right to fish on the high seas within certain definite limits."

They then cite an example in which this has been done.[49]

After attributing this argument to the United States—and it is submitted the record will be searched in vain for any such argument[50]—they thus apparently draw the conclusion that the United States in renouncing the right to fish in these bays renounced a part of the high seas. This it would seem is a most emphatic denial of Great Britain's contention, and of the vital and decisive ground on which it was based, that these bays were territorial bays of Great Britain.[51] Thus the Tribunal has reached Great Britain's conclusion while denying the only ground on which that conclu-

[48]British printed report of oral argument, 637. Some of the authorities which support that position—none were found to differ—were the following: Wheaton, Elements sec. 177; Oppenheim 222, 247; 1 Phillimore, 1879 ed., 284; Pitt Cobbett, 3rd. ed., 143; Calvo sec. 365, p. 498; Klüber sec. 130; G. F. De Martens sec. 153; 1 Halleck, 1908 ed., 167; 1 Ferguson 399; Creasy 232; Taylor sec. 217, 228; Bonfils sec. 515; De Cussy sec. 40.

[49]Award, p. 31-32; Journal, p. 978.

[50]On the contrary, as reported on page 649 of the British printed report of oral argument, Mr. Warren, in answer to a question of Judge Gray of the court as to whether in international law one nation could, by treaty, "exclude itself from certain portions of the high seas" stated: "Most certainly."

[51]The tribunal finds expressly that the bays renounced were geographical bays, but in their recommendation limit these bays to such as are ten miles wide.

sion rested and have supported their decision on a ground expressly disavowed by British counsel. The United States did not deny that a nation could renounce its rights in the high seas; they simply argued that it is preposterous to suppose that the American negotiators in this case renounced in Great Britain's favor a portion of the high seas.

Various minor findings under Question V are of considerable interest in international law, but lack of space forbids further discussion at this time.

Perhaps the most illuminating part of the conclusions of the arbitrators is Dr. Drago's dissenting opinion. He finds that only territorial bays were renounced in the Treaty, but while concurring in the theory of defensibility as the test of territoriality he finds that a territorial bay should be considered one of ten miles width, because several treaties and instructions from 1839 on[52] which adopted the three mile from shore rule, adopted for bays the limit of ten miles.

By the strict terms of the award, which finds that the negotiators in renouncing a bay meant a bay, the question is left exactly where it was before its present submission to arbitration. Only the acceptance by both nations of the *recommendations* made by the Tribunal can vitalize the decision with effective consequences. These recommendations were to the effect that the geographical bays renounced in 1818, with the exception of certain designated bays, should be considered such as were situated inside a line drawn from shore to shore at the point where the width of the bay first contracts to ten marine miles.[53] The waters lying seaward of this ten mile line, allowing for the three mile strip, are open sea. In the case of the specifically designated bays, the delimiting lines recommended by the Tribunal give to the United States a greater area of fishing ground than they would have secured under the

[52]Treaty between Great Britain and France, August 2, 1839, Art. IX, Hertslet's Treaties and Conventions, V., p. 89; Regulations between Great Britain and France, May 24, 1843 Art. II, Hertslet, VI, 416; Treaty between Great Britain and France, Nov. 11, 1867, Art. I, Hertslet, XII, 1126, British Case Appendix, 38; British notice to fishermen, North German Confederation Convention, November, 1868, Hertslet, XIV, 1055; North Sea Fisheries Convention, May 6, 1882, Art. II, Hertslet, XIV, 794; British Order in Council, Oct. 23, 1877, Hertslet, XIV, p. 1032. For the reasons for the adoption of the ten mile rule see Professor Moore's communication to the Institute of International Law, "Annuaire," 1894, p. 146.

[53]The tribunal here adopted the rule laid down in the Treaty of 1839 between France and Great Britain and in several other fishing treaties and instructions which reserve fishing exclusively for nationals within bays ten miles or less wide. Award, 37; Journal, 983.

Bayard-Chamberlain Treaty of 1888 which the Senate refused to ratify.

Assuming that the recommendations will be accepted, the inhabitants of the United States, under the most unfavorable interpretation of the decision, have lost the right to fish in an expanse of four miles which they hitherto enjoyed and claimed as of right under the Treaty. The claim of Great Britain, on the other hand, that all the wide bays on the northeastern coast of the Atlantic were British bays and were renounced in the Treaty, has been distinctly denied, and under the most liberal interpretation a British or geographical bay has been limited to one not more than ten miles wide.

The practical result, therefore, is a substantial victory for the United States in that Great Britain must either by a new treaty agree that no bay (outside of those specifically designated) greater in width than ten marine miles, is a bay within the meaning of the Treaty, or should a specific case arise in a municipal court by reason of a seizure, she will be forced into that position by the decision of the court, which will be compelled to hold that the Hague Tribunal defined a geographical bay as one not more than ten miles in width.

Under Question VI, the Tribunal decided in favor of the contention of the United States that the liberty to take fish "on the part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands and on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands" included the right to fish in the bays, harbors and creeks indenting that coast. That is, they reached the conclusion that under the word "coast," the shore of bays, creeks and harbors indenting that coast are included.[54]

The decision under Question VII required an answer to the question whether "the inhabitants of the United States whose vessels resort to the Treaty coast for the purpose of exercising the liberties referred to in Article One of the Treaty of 1818" were "entitled to have for those vessels when duly authorized by the United States in that behalf the commercial privileges on the Treaty coasts accorded by agreement or otherwise to United States trading vessels generally."

It was admitted that the Treaty conferred no commercial privileges of trade, but the submission involved the issue as to whether a vessel of the United States which is authorized to trade is by

[54]Award, 39-40; Journal, 986-87.

virtue of that fact excluded from the fishing privileges or whether a vessel which is on the Treaty coast for fishing purposes is thereby excluded from the trading privileges accorded to trading vessels in general.[55]

The Tribunal decided that American fishing vessels were entitled to commercial privileges—assuming they were accorded to trading vessels of the United States generally,—"the Treaty containing nothing to the contrary," but, they said,

"they cannot at the same time and during the same voyage exercise their Treaty rights and enjoy their commercial privileges, because Treaty rights and commercial privileges are submitted to different rules, regulations and restraints."

In other words, the two rights cannot be exercised concurrently or during a voyage between two ports. A vessel from the United States can, however, proceed with a cargo to Newfoundland and discharge it; it may then fish on the Treaty coasts and bring home a cargo of fish. On the other hand, it may not leave the United States for the fishing grounds, exercise the fishing right and then trade in a Newfoundland port, as this would be exercising both rights on the same voyage.

The question as to the right of fishing vessels of the United States to go in for "casual and needful supplies," so long a subject of diplomatic dispute, was not submitted to the Tribunal nor decided.

On the whole the United States have not fared badly in the arbitration. Under Question I the veto power to unreasonable fishing legislation has been secured. The essential question submitted under Question II as to whether American vessel owners were within their Treaty right in engaging non-inhabitants of the United States for their crews, has been answered in favor of the United States. The findings under Questions III and IV support the contentions of the United States. Question V, even though interpreted most strongly against the United States, involves a loss at most of an expanse of four miles in bays. Under Question VI, the Tribunal concurs entirely with the contention of the United States, and under Question VII, the United States have gained their point. While the grounds of decision are in many cases unsatisfactory, it is believed that both countries will find the award acceptable.

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[55]British printed report of oral argument, 1346.